(4)

No. 90-499

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1990

ACMAT CORPORATION,

Petitioner,

v.

SCHOOL DISTRICT OF PHILADELPHIA,

Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RAY GODDARD
675 Third Avenue
New York, New York 10017
(212) 949-0555
Counsel of Record and
Attorney for Petitioner

Joseph P. Dineen
Edward A. Stein
Goddard & Blum
Of Counsel

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25 West 43rd Street New York, New York 10036 (212) 719-3120

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ARGUMENT

I. SPECIAL AND IMPORTANT REASONS REQUIRE THAT THE PETITION FOR A WRIT OF CERTIORARI BE GRANTED

The lower federal courts in this case ignored state court precedent and extinguished the well settled right of a party to a contract with the Commonwealth of Pennsylvania and its political subdivisions ("Government") to a full, fair and impartial hearing of its contract claims. The effect of the lower courts' decisions is to give the

Government sovereign immunity in virtually all of its publicly bid adhesion construction contracts, a principle that the Pennsylvania legislature has declined to enact into law. These decisions impact on the entire construction industry. Not only will they discourage contractors from entering into contracts with the Government in the future and cause a steep rise in the cost of public construction, they will retroactively eliminate the legitimate expectations and legal rights of contractors, currently under contract with the Government, to have their claims adjudicated in a court of law.[1]

II. THE LOWER COURTS' DECISIONS CONSTITUTE A DENIAL OF DUE PROCESS

The School District of Philadelphia ("School District") does not cite a single case endorsing the irregular course authorized by the lower courts in the case at bar. The lower courts allowed one party to a contract to decide the other party's claims without a hearing and without judicial review.

The School District's argument opposing certiorari attempts to raise a number of erroneous procedural barriers to review that simply do not bear up under scrutiny. Contrary to the School District's assertions, the issue of enforcement of the "final arbiter" provision was raised in the initial papers submitted in opposition to summary judgment (R.A. 56, 57)[2] and was the subject of oral argument. The issue was raised again in the motion for reargument.[3]

[1] The significance of the issues raised by this case is further supported by the respondent's cross-petition which bears No. 90-680.

[2] Pages in parenthesis with the prefix "R.A." refer to appendices attached to respondent's brief in opposition.

[3] Acmat also raised the due process argument in a Supplemental Memorandum of Law in response to the School District's Motion to Dismiss which was based on

(R.A. 86) Also, contrary to the School District's contentions, the record shows that Acmat's motion for reargument was considered on the merits, but that the district court concluded that nothing new had been raised on reargument and that all of the points had been raised previously. (Appendix ["App."] D at 51a).[4] Accordingly, the School District is incorrect in stating that the issues presented in the petition for a writ of certiorari were not timely raised. The School District's only substantive argument on the due process issue is premised on the quote of the first two sentences of a paragraph in the Pennsylvania Superior Court's opinion in *John F. Harkins Co., Inc. v. School District of Philadelphia*, 313 Pa. Super. Ct. 425, 460 A. 2d 260 (1983). That paragraph, however, goes on to explain that the contractor has the right to prove additional damages by a preponderance of the evidence. This is a clear reference to a trial before a court of law. The School District must have recognized the true import of the *Harkins* opinion because the next paragraph of its brief asserts that the case should not be followed, as it is an intermediate appellate court decision. It is well established, however, that a federal court sitting in diversity will accept the holding of a state intermediate court, except when it is convinced that the highest state court would hold otherwise.[5] As stated in Acmat's petition for certiorari, *Harkins, supra*, is directly on point and is consistent with principles of due process. It was clearly improper for the lower courts to allow the School District to sit as judge and jury over its own case and then to refuse judicial review.

(fnt. 3 cont'd) virtually the same grounds as the Motion for Summary Judgment.

4 Appendices A through J are attached to Acmat's Petition. Appendices K through M are attached hereto.

5 The lower federal courts ignored *Harkins, supra*, despite the fact that it was extensively briefed by Acmat.

III. PREVAILING LAW RECOGNIZES THE CAUSES OF ACTION ASSERTED BY ACMAT

The School District continues to mischaracterize all of Acmat's claims as "extra work" because of the requirements for recovery of damages therefor. However, the Pennsylvania courts recognize that claims for differing site conditions [*Teodori v. Penn Hills School District Authority*, 413 Pa. 127, 196 A. 2d 306 (1964)], delay damages [*Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park*, 509 Pa. 553, 506 A. 2d 862 (1986)] and breach of contract [*Brinton v. School District of Shenango Township*, 81 Pa. Superior Ct. 450 (1923)], are separate and distinct from claims for extra work and are entitled to compensation even when claims for extra work are disallowed. The lower courts failed to discern the distinction among the different categories of claims asserted by Acmat in this action.

A. The lower courts ignored *Teodori*, which permits recovery for differing site conditions when the contract so provides.

It is submitted that the contractual language reviewed in *Teodori, supra*, is remarkably similar to that under consideration herein and that it authorizes recovery for the differing site condition claims asserted by Acmat. The contract in *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A. 2d 904 (1984), did not contain a differing site condition clause and its requirements for inspection were far more comprehensive than the inspection required of Acmat. In this connection, it should be understood that Acmat performed a pre-bid site inspection of the premises. (R.A. 64-R.A. 66, App K at 2a-4a, App. L at 8a-11a). There was no evidence that the inspection was not made and the statement in the School District's brief to the contrary is incorrect. The district court made the improper finding on a motion for

summary judgment that a *reasonable* site inspection was not made.[6] (App. C at 8a, 9a).

The School District's claim of insufficient notice is also incorrect since the volumes of project documents submitted in opposition to the motion for summary judgment show that the School District expressly directed the work performed by Acmat on account of differing site conditions.

B. Acmat is entitled to a trial on its claims for breach of contract, delay damages and quantum meruit recovery.

There can be no better example of denial of due process than the dismissal of Acmat's common law breach of contract claims. It demonstrates the improper granting of contractual immunity to the Government by the lower courts and so clearly shows the improper expansion of the *Nether* decision beyond all reasonable bounds. Breach of contract was alleged in Acmat's complaint and the nature of the breaches was the subject of argument in the papers opposing summary judgment and at oral argument. (R.A. 49, 50; App. K at 4a-7a). The School District's statement that this issue was not timely raised is incorrect.

The School District's argument concerning delay damages ignores the Pennsylvania cases permitting damages for delay despite the presence of exculpatory language. The sole case cited by the School District on this issue concerns Delaware law and has no bearing on this case. It is submitted that the law and facts presented in the petition show entitlement on a quantum meruit basis and that

[6] The "reasonableness" of the site inspection that was made was a "jury" question of fact and not one for the district court to have made on a summary judgment motion.

the claims based on that cause of action should have proceded to trial.

IV. IT WAS REVERSIBLE ERROR FOR THE DISTRICT COURT TO REJECT AN INSTRUCTION ON THE LAW OF IMMATERIAL BREACHES

The School District's argument is essentially that a party to a contract forfeits its right to contract balances no matter what the amount or magnitude of the alleged breach. The amount at issue in this instance is in the sum of $150,909.14, but could easily have been substantially greater had additional sums been withheld prior to completion of the projects. The retainage amount denied Acmat bears no relationship to the breach alleged and the School District showed no damages as a consequence of not having all the dump tickets.[7] Nor did the School District show that the debris had been disposed of improperly. The issue is solely one of documentation and is the type typically excused as an immaterial breach in construction litigation. The district court's failure to charge on the law of immaterial breaches was expressly excepted to at trial (App. M at 12a-14a) and constitutes reversible error.

[7] A significant number of dump tickets were received in evidence at trial, but copies of all the dump tickets could not be located. There was testimony, however, that they had all been mailed to the School District. In fact, Mr. Brazil, the School District's counsel at the time, with full knowledge of the contractual requirements concerning dump tickets, testified that he authorized payment of the *entire* contract balance due Acmat.

CONCLUSION

Acmat has been denied recovery of damages in excess of $6 million without any hearing whatsoever.

For these reasons, a writ of certiorari should be issued to review the judgment order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Ray Goddard
675 Third Avenue
New York, New York 10017
(212) 949-0555
Counsel of Record and
Attorney for Petitioner
Acmat Corporation

Joseph P. Dineen
Edward A. Stein
Goddard & Blum
Of Counsel

November 15, 1990

APPENDICES

APPENDIX K—EXCERPTS FROM TRANSCRIPT OF ARGUMENT ON MOTIONS FOR SUMMARY JUDGMENT ON OCTOBER 31, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT,

Plaintiff,

vs.

PHILADELPHIA SCHOOL DISTRICT, et al.

Defendant.

CA No. 85-7067

Philadelphia, PA
October 31, 1988
9:05 a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JAMES T. GILES
UNITED STATES DISTRICT JUDGE

Appendix K

APPEARANCES:

For ACMAT: ANDREW B. COHN, ESQUIRE
GLENN F. ROSENBLUM, ESQUIRE
Korn, Kline & Kutner
1845 Walnut Street, 21st Floor
Philadelphia, PA 19106 19103

For Philadelphia School District: ANDRE L. DENNIS, ESQUIRE
Stradley, Ronon, Stevens & Young
2600 One Commerce Square
Philadelphia, PA 19103-7098

For Marshall Marcus: ELLEN M. HOLTZMAN, ESQUIRE
2005 Market Street, Suite 3150
Philadelphia, PA 19103

For Hughes Urethane: JOHN M. HELEY, ESQUIRE
Kardos, Rickles, Sellers & Heley
626 South State Street
Newtown, PA 18940

(Proceedings recorded by electronic sound recording, transcript produced by transcription service.)

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* * *

THE COURT: Well, what was done affirmatively by the School District to cause ACMAT not to make the kind of inspection it now says it should have made?

MR. COHN: ACMAT was given an extremely brief walk-through type opportunity.

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THE COURT: My understanding is that the person who did the walk-through decided not to lift up the ceiling tiles and it was the failure to lift up the ceiling tiles, which were known to be the layer between the looker and the asbestos, that caused ACMAT to proceed with its bid and certain assumptions. Now, what affirmatively did the School District do to keep ACMAT from making the kind of physical inspection it now says that it should have made?

MR. COHN: Judge, with all deference, I believe your understanding is incorrect. I believe the testimony developed during discovery was that indeed some of the ceiling tiles were lifted, but not all of them. It would have taken weeks -- months -- to go through each one of those school rooms and expose the entire ceiling underside to determine exactly whether this overspray condition, which ACMAT contends the School District knew about or should have known about...

THE COURT: Where is that in the reply to the motion for summary judgment? The School District has submitted deposition testimony of your superintendent, I believe, who testified that upon beginning the work and upon lifting the ceiling tiles, the problems were readily ascertainable.

MR. COHN: Judge, my...

THE COURT: Where in your submissions is there a counter statement that the kind of inspection that was done upon the inception of the work, could not have been done during the inspection visit in preparation for the bid?

MR. COHN: My recollection of the testimony of ACMAT's employee, Mr. Nozko, specifically was that the opportunity given to ACMAT to inspect was essentially limited to a walk-through on

one day or two days. I cannot point to specifically, Judge. I would be pleased to.

THE COURT: Okay. Now, let me ask you another question.

MR. COHN: Yes.

THE COURT: In the brief in opposition, I believe that ACMAT makes a statement or alludes to something which is unsupported by any documentation. My recollection is that it was something that amounts to a statement that the School District, in the bid invitation, made some kind of misrepresentation or mislead ACMAT in some way to cause ACMAT to make the kind of bid that it made or the certain assumptions that it made. Is there anything in the record that suggests that ACMAT was misled by some statement of the School District?

MR. COHN: I believe Your Honor is referring to the overspray condition and ACMAT's...

THE COURT: Yes. Okay. Overspray.

MR. COHN: ...ACMAT's position on that is that the overspray condition was not disclosed and that the School...

* * *

THE COURT: The problem I have is this. It seems to me that if the parties entered into an agreement such as the one here where there's no arbitration provision and there is a dispute as to whether or not the work should continue—you know—you're not certain something is within the scope of the work...

MR. COHN: Yes.

Appendix K

THE COURT: ...and the parties can't reach some interim agreement—you know—we'll do the work and then we'll fight about it or we will limit the issues for resolution...

MR. COHN: Or submit it to arbitration during the project, which often happens.

THE COURT: Yes. I mean, the only option to the contractor is to refuse to do the work and force the School Board to sue. And thereby raising, in a proper forum, at a proper time, before expenditures of money have been incurred, the contract interpretation dispute. How else is it to be done? What you propose is this. That the contractor unilaterally should determine to go ahead with the work, no matter what it costs, and then send a bill to the School District after the fact saying, we contend that this is within the scope of the work clause and, School District, you have to pay us now all that we have incurred in the way of expense. What you propose then may sound fair, but basically the contractor then is in control of the purse strings and not the School Board. And that's the problem with the School Board law.

MR. COHN: Judge, this contract provided affirmatively for an equitable adjustment if certain work beyond the scope of the contract was performed.

THE COURT: Well, I agree. I agree.

MR. COHN: Yes.

THE COURT: The problem is, if it's beyond the scope of the contract. So you put the rabbit in the hat, but you don't answer the question. The only way that this accountability requirement upon

the public officials can be met is if they, in advance, approve the expenditure of money.

MR. COHN: Which the School Board had the opportunity to do...

THE COURT: Well...

MR. COHN: ...and then chose not to do it...

THE COURT: Okay. Okay.

MR. COHN: ...for whatever reason.

THE COURT: We're not going to do it. We're not going to pay the money. The School Board makes that decision. The School District informs ACMAT, we have made a decision not to pay twice for the same work.

MR. COHN: Yes. Understood.

THE COURT: Then ACMAT goes ahead and incurs the expense.

MR. COHN: ACMAT has a choice at that point. It can say, fine, we're not going to do the work. In which case, as a practical reality, on this project the job would have come to a grinding halt...

THE COURT: Oh, it may have. It may have.

MR. COHN: The schools wouldn't have been open and the asbestos health hazard would have remained and ACMAT probably would have been subject to litigation at that point. The flip side, which is what ACMAT chose to do, was fine, you think it's within the scope of our contract, School Board? We do not. We are going ahead, based on the contract which says that if we do work outside

the scope there shall be an equitable adjustment. We're willing to take the risk. We think that this work was not properly included within our contract and in order for us to fully perform the remainder of the contract we have to do this work, too.

We're already in there. We already have forces mobilized. You've been on our backs for weeks to get this job done, to get this school open in the Fall, and remove this health hazard. We're going to do the work, but we're going to hold you accountable. And that's what ACMAT did. Now, I think Your Honor is concerned that now there's still a dispute and someone has to resolve it and that's this Court.

THE COURT: Well..

MR. COHN: But I think that's what the contract contemplated. If there's a dispute over whether certain work was within or without our contract and if there's a factual dispute over what the proper cost for doing that work was,...

* * *

APPENDIX L—AFFIDAVIT OF FREDERICK F. DALTON, SWORN TO ON JUNE 2, 1989

In The United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION,

Plaintiff,

v.

THE SCHOOL DISTRICT OF PHILADELPHIA,

Defendant.

AFFIDAVIT

HON. JAMES T. GILES
CIVIL ACTION NO. 85-7067

STATE OF CONNECTICUT)
) ss:
COUNTY OF HARTFORD)

Frederick F. Dalton, being duly sworn, deposes and says:

1. I am a former project manager for Acmat Corporation; having been in their employ from 1979 to 1986. This affidavit is made at the request of Acmat Corporation in connection with its motion to reargue the prior motion in

which partial summary judgment was granted to the School District.

2. During the first part of 1984 I became aware of the fact that an asbestos abatement program was about to be undertaken by the School District of Philadelphia in the city's public schools. My employer asked me to attend the pre-bid meeting that was scheduled for January 24, 1984 and I reported back to the Company immediately after the meeting. Nothing of an unusual nature was discussed at the meeting and Acmat remained interested in bidding the various projects.

3. Thereafter, I returned to Philadelphia to participate in a pre-bid inspection of several schools that were being conducted by the School District. I found that I was one of many bidders that made up a group that would visit several schools during the day. We actually formed a caravan of vehicles as we were ushered from one school to another.

4. These site visits were conducted like tours with the School District's consultants acting as tour guides. School District personnel were also present during the site visits. I visited several schools during the one day tour. The bidders were kept together as a group and were not permitted to wander off to any areas by themselves.

5. Certain ceiling tiles were missing or were removed during the site visit by the owner to allow the bidders to apprise themselves of conditions above the ceiling. I saw the typical conditions that one would expect to find on such a project. Asbestos fireproofing on the structural beams was visible, as well as, the customary amount of overspray. No unusual

conditions were detected or described by the School District and the inspection was typical for this type of project. I have participated in many such site inspections before and since the one in Philadelphia.

6. None of the participants in the site visit were wearing protective clothing or gear that would allow the bidders to raise or dislodge other ceiling tiles. Exposure to asbestos is a real possibility unless special precautions are taken before and during tile removal. Nor was there any reason to perform a more penetrating site examination since the conditions that were shown to exist seemed perfectly normal for this type of project. As a matter of fact a more comprehensive site examination that would have detected every particle of asbestos would have been impossible without demolishing permanent structures in the building and that was not a feasible approach to take. I reported my findings to the Acmat home office.

7. On a separate occasion, prior to Acmat's finalization of the Rush School contract, I visited the Rush School to conduct an inspection and did so with the School's custodian. I found nothing of an unusual nature and once again reported my findings back to the main office.

8. I understand that contracts were signed for asbestos abatement at three schools. I had no further connection with the project, but the actual conditions found in the buildings have been described to me.

9. The overspray condition that was described to me and the other conditions that became known when the ceilings and other structures were removed came as a great surprise to

me. There was no evidence that these conditions were present and the bidders were never told that such conditions could be present at the site.

Signature X
Frederick F. Dalton

Sworn to before me this 2nd day of June, 1989.

Signature X
Notary Public

APPENDIX M—EXCERPTS FROM TRANSCRIPT OF TRIAL ON JULY 13, 1989

In The United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT

v.

SCHOOL DISTRICT OF PHILADELPHIA

Philadelphia, Pennsylvania
July 13, 1989

CIVIL ACTION NO. 85-7067

JURY TRIAL
BEFORE THE HONORABLE JAMES T. GILES, J.
UNITED STATES DISTRICT JUDGE

APPEARANCES

For the Plaintiff: ANDRE DENNIS, ESQUIRE
2600 One Commerce Square
Philadelphia, PA 19103

Appendix M

For the Defendant: JOSEPH DINEEN, ESQUIRE
675 Third Avenue
New York, NY 10017

Audio Operator: Andrew Schwab

Transcribed by: Tracey J. Williams

(Proceedings recorded by Electronic Sound Recording, transcript produced by transcription service)

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* * *

THE COURT: Well, you didn't put any evidence in on that.

MR. DINEEN: Well, your Honor wouldn't permit us, as I recall, to put in evidence.

THE COURT: You didn't have any evidence. Your evidence was that the contract was—that by a certain date the work was done. You did not contend that there was substantial completion earlier than the date you left the job.

Let's go on.

MR. DINEEN: You didn't charge the jury, your Honor, that the damages which the School District claims have to have a reasonable degree of certainty to the alleged breach by Acmat.

Your Honor failed to charge the jury on the issue of immaterial breach in connection with the dump tickets.

THE COURT: You don't consider that immaterial breach, do you?

MR. DINEEN: Your Honor, in light of the testimony—

THE COURT: Even if you failed to supply it?

MR. DINEEN: In light of the testimony that was adduced at this trial, your Honor should—

THE COURT: You didn't even argue that was an immaterial breach.

MR. DINEEN: That was argued earlier in the case, your Honor.

THE COURT: You didn't argue to this jury that that would have been an immaterial breach. Your evidence was to the contrary, that it was very important.

Go ahead.

MR. DINEEN: Your Honor also indicated that the School District's position on the dump tickets is that they never received them and I don't believe there was any credible testimony offered at this trial to that effect. Mr. Brazil indicated that he didn't recall receiving them, but that is not evidence that the School District didn't receive them.

THE COURT: That's your recollection of what he said.

MR. DINEEN: Everything is based on that, your Honor.

THE COURT: Thank you very much.

(End of sidebar discussion.)

* * *